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The Indemnity Agreement Revisited

The Warranty Program is now extending a right of appeal for breach of warranty decisions to registered builders in the Province of Ontario through the Builders Arbitration Forum. However, an individual or a corporation who has signed a comprehensive indemnity agreement with the Warranty Program to indemnify the warranty and contractual obligations of the vendor/builder registrant has no such right of appeal to the Builders Arbitration Forum or to LAT.

This oversight denies indemnifiers the right to challenge decisions regarding breach of warranty or contract on the part of the registrant that will directly impact the indemnifier's financial position.

When an indemnifier obtains from the Warranty Program an invoice requesting payment for breaches of warranty or contract occasioned by the registrant, he receives no information on the particular breach or breaches to which the Warranty Program is making reference and is entitled to no details from the Warranty Program regarding the circumstance that gave rise to the breach.

Should the indemnifier fail or refuse to pay the amount invoiced, ONHWP can report the default in payment to Equifax, and that record will thereafter affect the credit rating of the indemnified individual or corporation. In the indemnity agreement there is no notice that this will occur and no way to prevent it from happening!

In fact the indemnifier has no recourse under the *Ontario New Home Warranties Plan Act* to challenge the amount of the invoice or whether the indemnity actually applies or whether or not there has been a breach of warranty or contract on the part of the registrant!

The Warranty Program can require the production and execution of documents such as the indemnity agreement as a term of registration only where their requirement is fair and reasonable under the circumstances. It is suggested that the requirement for registrants to find indemnifiers who must sign comprehensive indemnity agreements in order for the registrant to obtain registration, in circumstances where the indemnifier has no right of appeal regarding the use of indemnity by ONHWP, is unreasonable.

Pursuant to the provisions of any indemnify agreement, the Warranty Program can demand payment from the indemnifier once an invoice has been received by him, without any proof of the actual liability of the registrant or the indemnifier to the Warranty Program. Therefore the indemnity acts like an irrevocable letter of credit. For example, where the Warranty Program determines in its sole discretion that a breach of warranty has occurred, it can draw down on a letter of credit provided by a registrant. Similarly if the Warranty Program believes a registrant has breached a warranty and ONHWP pays the homeowner for this breach, it can invoice the indemnifier and he is required to pay the invoice without any proof of liability on the part of ONHWP.

In addition, no evidence is provided by ONHWP to the indemnifier as to how the amount of the indemnification as set out in the indemnity agreement is calculated. There is no evidence as to whether or not the criteria for determining the scope of the indemnity is based on Bulletin 28. If it does relate to Bulletin 28 criteria then exactly how is the amount calculated? If it does not relate to the criteria of Bulletin 28, what criteria is used and why is no explanation provided to

the indemnifier in that regard? As it now stands no information is provided. The Program presumes that it is entitled to an indemnification amount which is $20,000.00 times the number of homes that a registrant may propose to build in any given year.

If that is the case then the indemnification limit bears no resemblance to the risk that the Warranty Program bears regarding the construction of any home. The $20,000.00 figure is a arbitrary number and not based on any claims experience that can be identified by the Warranty Program.

There are no risk calculations provided by the Warranty Program to an indemnifier before he is obliged to sign an indemnity agreement, which would explain ONHWP's specific risk.

In addition, the Warranty Program does not deal directly with indemnifiers even though the indemnity agreement sets out a provision whereby the indemnifier, by executing the agreement, confirms that he has had the opportunity to seek independent legal advice. The Program does not confirm that any such independent legal advice has been obtained and such independent legal advice would not be particularly helpful in the absence of knowing the nature of the liability that is set out in the indemnity agreement itself, which is not disclosed to the indemnifier.

In addition, whatever the limit of the liability selected by the Warranty Program may be, neither the registrant nor the indemnifier can challenge it. The document is presented to the indemnifier like an insurance contract. You either take it or leave it! However the Warranty Program is not an insurer and does not calculate the enrolment fee paid by registrants as if it was a true premium. When obtaining security and indemnification agreements ONHWP is imposing terms and conditions of registration that bear no resemblance to what would be required by a real insurance company. In addition, even if the Program does consider itself to be an insurance company, it is no help to the indemnifier, because the Warranty Program is the only insurer in town and the indemnifier does not have the opportunity of comparison shopping.

If the indemnifier does not know how the Program calculates the limit of liability (i.e. the risk) in the indemnity agreement, then he has no idea whether or not he is being asked to indemnify to a higher limit than is necessary. In other words he does not know if he is earmarking too many of his assets, and he has no way of ascertaining this.

Let's look specifically at the provisions set out under the indemnity agreements

The initial paragraphs the agreement are not specific as to what in fact is being indemnified. Is the indemnifier indemnifying all of the construction projects of the registrant or is he indemnifying specific homes or projects? Is the limit of liability directed to certain specific homes so that the indemnifier has an idea of his actual liability or exposure? In my view it would be better to be specific as to the homes in question rather than specific as to the amount. Because an indemnity agreement lasts for five years, it may be required initially, for a project of say fifteen homes. Thereafter, when a subsequent project is commenced by the registrant, the indemnity will expose the indemnifier to new liability without the indemnifier being privy to the new risks. He signs on for five years, whatever becomes of the builder! The liability should only be for specific homes!

The agreement requires the indemnifier to indemnify the Warranty Program against the breaches of the Warranty Program Bulletins. This requires an indemnifier to guarantee

compliance with Bulletins which are not part of the Act of the Regulations but are only guidelines that the Warranty Program follows. If a builder fails to comply with a Bulletin it may lead to financial liability on the part of the indemnifiers.

The provisions of the indemnity agreement state that the Warranty Program can pay what it sees fit in respect of the breaches of warranty or contract, and the indemnifier must repay the amount paid by the Warranty Program in circumstances where it has no right to challenge it. In other words there is no hearing regarding the propriety of the Warranty Program's decision. This is both unreasonable and unfair.

The provisions of the indemnity agreement state that the indemnifier must pay the Warranty Program's costs if there is litigation. This provision is contrary to the way in which the cost awards are made in a normal litigation proceeding. The indemnifier is being asked to contract out of a situation where if there was litigation and the indemnifier was successful the Warranty Program would be obliged to pay the indemnifier's costs. Under the indemnity agreement the indemnifier is required to pay the Warranty Program's costs whatever the outcome!

The provisions of the indemnity agreement do not require the Warranty Program to sue an indemnifier on an invoice sent to the indemnifier. Should the indemnifier not pay the invoice then the information will be communicated by the Warranty Program to Equifax and the credit rating of the indemnifier is altered, without notice and without recourse on the part of the indemnifier.

In addition, if the Warranty Program settles a claim between itself and the registrant it need not inform the indemnifier of such settlement and the indemnifier's limit of liability is not decreased by the amount of the settlement. This is unreasonable because the registrant's liability and obligations have decreased while the indemnifiers obligations remain the same!

To the extent that payment by a registrant to reduce a registrant's obligations does not reduce the liability and obligations of the indemnifier, this means that the liability of the indemnifier is not limited but is infinite in duration and amount. This is unreasonable.

For example, payment on a particular home of an invoiced amount by the registrant eliminates the liability of the registrant for that home but does not eliminate the liability of the indemnifier. This means that the indemnifier's limit on the home of $20,000.00 is an illusion should there be another claim for $20,000.00 on that same home. The indemnifier is liable for the first $20,000.00 and for the second $20,000.00! This is unreasonable.

In addition, the provisions of the indemnity agreement state that if there is more than one indemnifier, should a debt of the registrant be eliminated by one indemnifier, it does not reduce the indemnity obligations of the other indemnifiers. This means that the Warranty Program can obtain double and triple indemnity for the same risk where it obtains more than one indemnification. The indemnifications do not off-set each other and therefore they each stand alone as separate security for the Warranty Program. This is unreasonable.

In addition, by the provisions of the indemnity agreement, if the registrant sells the registered company to a third party with different owners, officers and directors, the initial indemnity agreement continues, whether or not the indemnifiers are unaware of the sale.

There is no obligation on the part of ONHWP to advise the indemnifiers of the sale of the registrant, and furthermore, there is no release of the indemnity even if the Warranty Program finds other indemnifiers for the registered company. This perpetuates the indemnity and does

not tie in the indemnity agreement to the specific obligations of the registrant for which the indemnity was initially provided. This is unreasonable.

The indemnity agreements also state that even if a registrant is discharged by the Warranty Program in respect of any obligations it may have to it, the indemnifier is not. To me this is legally impossible because the indemnifier is only liable to the extent that the registrant is liable. If the liability of the registrant has been discharged, the indemnity cannot continue on its own. To the extent that it does it is unreasonable.

Lastly and perhaps most importantly, the indemnity agreement states that an indemnifier is not permitted to defend itself if the Warranty Program sues on an invoice. Amongst other things this may offend the provisions of section 7 of the Charter of Rights and Freedoms because it removes the right of an indemnifier to due process. In addition, the agreement itself limits the number of defences that may be available to the indemnifier. This is unreasonable.

Generally speaking the new indemnity agreement is a document that should be seriously reviewed by anyone asked to provide one, because there are few rights available to the indemnifier against the Warranty Program. It should only be in exceptional circumstances that an indemnifier executes such an agreement and agrees to be bound by all of its provisions.

The alternative would be to sign back an indemnity agreement wherein the terms that do not appear to be relevant or reasonable are removed; the Program still receives an indemnity which is not unreasonable and which does not limit the legal rights of the signator.

Lastly, the indemnifier is not without a remedy. Should he receive an invoice from ONHWP, demanding payment of an amount paid by ONHWP as a claim, the indemnifier can sue ONHWP and seek a declaration that the debt is not owing by the indemnifier. In addition the indemnifier could move to prevent ONHWP from communicating the “debt” owing to Equifax. This would have to occur promptly.

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